MOTION FILED
JUL 29 1998

No. 98-~~100000~~2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

RICHARD SABO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR AMERICAN COUNCIL OF LIFE INSURANCE

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MOTION OF AMERICAN COUNCIL OF LIFE INSURANCE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

American Council of Life Insurance hereby moves, pursuant to Rule 37 of this Court, for leave to file an *Amicus Curiae* Brief urging the Court to grant the petition and schedule the case together with *Humana, Inc. v. Forsyth*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). The motion is necessitated by Respondent's refusal to consent.

American Council of Life Insurance ("ACLI") is the principal trade association for life insurance companies, representing 532 life insurers that have issued approximately 90% of the life insurance in force in the United States. ACLI files briefs before courts of appellate jurisdiction in cases which

raise significant questions of insurance law and which have a substantial impact on its member insurers and the public.

ACLI has a strong interest in the construction of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994), which generally reserves to the states the regulation of insurance and provides that, unless explicit, no federal law should be construed to "invalidate, impair or supersede" state regulation of the "business of insurance." 15 U.S.C. § 1012(b). In *Humana, Inc. v. Forsyth*, this Court granted the petition for certiorari to consider a split among the circuits on whether a federal RICO cause of action for treble damages would "invalidate, impair, or supersede" the state insurance regulatory systems. This case involves insurance sales practices, a core competency of state regulators, and, together with *Humana*, sharply poses the legal and policy implications at issue.

American Council of Life Insurance believes that the decision below, if upheld, will significantly alter the regulation of all insurance companies. ACLI thus respectfully prays that the Court grant the motion for leave to file its brief.

Respectfully submitted,

/s/ PHILIP K. HOWARD

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR AMERICAN COUNCIL OF LIFE INSURANCE

American Council of Life Insurance, the principal trade association for life insurance companies in the United States, submits this brief *amicus curiae* in support of the Petition.[1]

Summary of Argument

The issue presented, whether a federal RICO treble damage claim will "invalidate, impair or supersede" a state's regulation

[1] Pursuant to Rule 37.6, American Council of Life Insurance states that counsel for no party authored any portion of the brief, and that no party made a financial contribution to the preparation or submission of the brief. Pursuant to Rule 37.2(a), ACLI states that respondent did not consent to the filing of this brief.

of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994), is one of vital importance to the life insurance industry. Mandatory treble damages claims under RICO would threaten the financial stability of insurance companies and thereby undermine an important goal of state regulation. Further, the reasoning of the decision below would permit application of federal laws generally to state insurance regulation and thereby alter the regulatory balance. The issue is before the Court in *Humana, Inc. v. Forsyth*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). ACLI urges the Court to hear this case together with *Humana* because this case involves a standard regulatory concern, the sale of life insurance, and presents different regulatory schemes remedying such problems. This case thus provides the Court with the basis for a broader and more dispositive ruling than does *Humana* alone.

Argument

For over 100 years, the regulation of insurance companies has been the province of the states. This policy was reaffirmed by Congress in 1945 in the McCarran-Ferguson Act, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), although explicitly encompassing many statutory crimes and violations of law, nowhere indicates that Congress intended it to apply to the business of insurance.

The court below held that a federal RICO action for treble damages would not "invalidate, impair or supersede" Pennsylvania insurance regulation. *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 195 (3d Cir. 1998). The basis for this

decision was that there was no "direct conflict" between a RICO claim and any state regulation, applying a test normally used to determine whether a state law is preempted by federal law. Similar holdings have been adopted by the First, Seventh and Ninth circuits.[2] By contrast, the Fourth, Sixth and Eighth circuits have held that a RICO claim alters the balance of state regulation and consequently is barred by McCarran-Ferguson.[3]

The Court has already recognized in *Humana* that the issue of whether a RICO remedy should "supplement" state insurance regulation, as held below, requires resolution by the Supreme Court. The value to the Court in hearing this case simultaneously is that it presents a traditional fact pattern of insurance regulation, and sharply poses the policy issues. In each of the following ways, this case will supplement *Humana*:

> (i) The MetLife allegations involve alleged misconduct in the sale of life insurance, an area the court below acknowledged as the "core" of insurance regulation. *Sabo*, 137 F.3d at 191. *Humana*, by contrast, alleges a scheme to misappropriate rebates from an affiliated health institution.
>
> (ii) Pennsylvania has enacted a comprehensive insurance regulatory scheme that aims to balance goals of consumer protection with protection of the financial health of insurers in the state. The Pennsylvania commissioner regularly conducts regulatory examinations of insurers, including in this situation. *See Sabo v.*

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[2] *Villafañe-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992).

[3] *Doe v. Norwest Bank Minn.*, 107 F.3d 1297, 1307-08 (8th Cir. 1997); *Kenty v. Bank One*, 92 F.3d 384, 392 (6th Cir. 1996); *Ambrose v. Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153, 1165-67 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996).

Metropolitan Life Ins. Co., No. Civ. A. 94-307, 1995 WL 928256, at *3 n.1 (W.D. Pa. Jan. 4, 1995). A question before the Court is whether the availability of a RICO treble damages action would "invalidate, impair or supersede" the regulatory scheme.

(iii) The Pennsylvania legislature also passed its own RICO statute which, unlike federal RICO, provides no private right of action. 18 Pa. Con. Stat. Ann. § 911. In addition to its own comprehensive regulatory scheme, the jurisdiction in *Humana*, Nevada, has a RICO statute that permits treble damages claims in certain situations, although not as broadly as the federal action. Nev. Rev. Stat. §§ 207.350-207.520. As we note below, these distinctions in state law, depending on the Court's holding, could conceivably determine the reach of federal RICO.

The lower court's reliance on the "direct conflict" test when interpreting the scope of McCarran-Ferguson could dramatically affect the insurance industry by permitting a wide range of federal laws to apply to insurance regulation. The policy behind preemption, however, is exactly the opposite: the purpose is to *avoid* federal interference with state regulation by limiting preemption of state laws to the situations where they "directly conflict" with a federal statute. McCarran-Ferguson takes the presumption in favor of state law dramatically further and, in essence, precludes application of any general federal statute if it would impliedly "invalidate, impair or supersede" state regulation. By creating a presumption in favor of applying federal law to the business of insurance, the decision below turns the explicit mandate of McCarran-Ferguson on its head and undermines the purpose of the preemption doctrine.

Substantial uncertainty will result from the holding below as to whether any particular federal law "directly conflicts" with each state's regulatory scheme. Pennsylvania's RICO statute, as noted, might be held to apply to insurance miscon-

duct, but does not provide a private right of action. Does that clear intent of the Pennsylvania legislature to exclude a private right mean that there is a "direct conflict" with federal RICO, which provides a private right of action? Or does the absence of a private right under Pennsylvania RICO mean that there is no "direct conflict" on the basis, adopted by the court below, that the federal RICO statute merely supplements Pennsylvania law? Similar questions arise with respect to many federal statutes, and in each of fifty states, in light of the decision below.

Regulating insurance companies, unlike certain other areas of regulation, has always been two-sided. A state has an interest not only in deterring and remedying any misconduct by insurers, but also in ensuring that insurance companies remain solvent and healthy for the benefit of all the insured. Thus, in its choice of rules and remedies, the regulatory scheme crafted by the Pennsylvania legislature "establishes and regulates . . . . the balance of relationships between insurance entities and insureds." *Wexco Inc. v. I.M.C., Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993). The key to the ruling below, by contrast, was the presumption that "divergent state and federal implementation of similar legal norms" will not materially affect Pennsylvania's insurance scheme. *Sabo*, 137 F.3d at 194. This holding, which necessarily undermines a state's efforts to balance the interests of insureds and insurers, is contrary to established jurisprudence.[4] In general,

[4] *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (state remedies would upset "the balance of public and private interests so carefully addressed by the [Clean Air] Act"); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 452 U.S. 77, 97 (1981) (right to contribution precluded by Title VII and the Equal Pay Act because such "new remedies might upset carefully considered legislative programs" embodied by the statues); *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953) ("[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent."). The Court has also developed an abstention doctrine that cautions federal courts to withhold jurisdiction in instances where a comprehensive state regulatory program already occupies the field. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 325-27

as Justice Frankfurter noted, "remedies form an ingredient of any integrated scheme of regulation," and to permit dual remedies for the same wrong "only accentuates the danger of conflict" by "allowing two law-making sources to govern." *San Diego Bldg. Trades Council v. J. S. Garmon*, 359 U.S. 236, 247 (1959).

When deciding whether federal law should be applied "'in a field which the States have traditionally occupied,'" the Court has held that the state law should not be "'superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). There is no evidence that Congress intended RICO to apply to the business of insurance. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985). Thus, private claims under RICO, characterized by one appellate court as a "thermonuclear device,"[5] cannot be applied to that industry without subverting Congress's intent in the McCarran-Ferguson Act to reserve insurance regulation to the states.

(1943). *See also Alabama Public Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341, 351 (1951) (federal courts should "exercise their discretionary power to grant or withhold relief" in areas of traditional state concern "so as to avoid needless obstruction of the domestic policy of the states") (internal quotations omitted).

[5] *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

Conclusion

For the reasons stated, American Council of Life Insurance urges that the petition be granted and argument heard on the same day as *Humana, Inc. v. Forsyth*.

Respectfully submitted,

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